Supreme Court, U.S.
FILED

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No. ____

IN THE

Supreme Court of the United States

YSLETA DEL SUR PUEBLO, *et al.*,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1987, Congress restored the federal trust relationship with Ysleta del Sur Pueblo. 25 U.S.C. § 1300g *et seq.* Congress provided that all gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. 25 U.S.C. § 1300g-6(a). Congress further provided, however, that nothing in section 1300g-6 shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas. 25 U.S.C. § 1300g-6(b). The next year, Congress enacted the Indian Gaming Regulatory Act.

1. Does the Indian Gaming Regulatory Act, instead of the Pueblo's Restoration Act, govern gaming activities on the reservation lands of the Ysleta del Sur Pueblo?

2. If not, should the gaming provisions of the Pueblo's Restoration Act be interpreted consistently with this Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) thus preventing a grave miscarriage of justice?

3. If not, can the federal courts require the Pueblo

A. to obtain a license from the State of Texas prior to conducting bingo in accordance with the substantive provisions of Chapter 2001 of the Texas Occupation Code; and,

B. to be a "qualified organization" prior to conducting bonafide carnival contests when no such requirement exists for any other person?

In short, will this Court exercise its supervisory power to prevent a grave miscarriage of justice wrought by the federal courts in derogation of this country's trust relationship with the Pueblo?

LIST OF PARTIES

State of Texas

Ysleta del Sur Pueblo,
a federally recog[illegible]ed Indian tribe, 25 U.S.C. § 1300g *et seq.*

Tigua Gaming Agency,
a regulatory agency of the Pueblo

Tribal Council,
the governing body of the Pueblo, 25 U.S.C. § 1300g-3(b)

Arturo Senclair, successor to Albert Alvidrez,
Tribal Governor

Carlos Hisa,
Tribal Lieutenant Governor

George Candelaria, successor to Francisco Hernandez,
Tribal Gaming Commissioner

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Come now Ysleta del Sur Pueblo, the Tigua Gaming Agency, the Tribal Council, Albert Alvidrez, Carlos Hisa, and Francisco Hernandez seeking a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, and would respectfully show unto the honorable Court as follows:

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit was entered on May 17, 2002. *See* Appendix A. The motions for rehearing and rehearing en banc were denied on June 25, 2003. *See* Appendix B. Jurisdiction of this Court is proper under 28 U.S.C. § 1254(1).

OPINIONS AND ORDERS BELOW

Petitioners appealed an Order Modifying September 27, 2001, Injunction of the United States District Court for the Western District of Texas, which is not reported, and neither is the opinion of the Fifth Circuit affirming the district court's rulings. *See* Appendix C.

STATUTORY PROVISIONS

The primary statutory provision at issue is set out below.

25 U.S.C. § 1300g-6 Gaming activities

(a) In general

> All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. . . . .

(b) No State regulatory jurisdiction

> Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas. . . . .

The entirety of section 1300g-6, as well as other pertinent portions of the federal act by which Congress restored this country's trust relationship with the Pueblo, is set out in the Appendix D.

ARGUMENT

This is the third petition filed by the Pueblo in this latest lawsuit in a course of litigation between it and the State which spans a decade. This petition concerns the modification of an injunction which imposed a state regulatory scheme over gaming on the Pueblo's reservation in direct conflict with a congressional mandate.

In 1987, Congress restored the federal trust relationship with Ysleta del Sur Pueblo. 25 U.S.C. § 1300g *et seq.* (the Restoration Act). Congress provided that all gaming activi-

ties which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. 25 U.S.C. § 1300g-6(a). Congress further provided, however, that nothing in section 1300g-6 shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas. 25 U.S.C. § 1300g-6(a). The next year, Congress enacted the Indian Gaming Regulatory Act (IGRA).

In *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994) ("*Ysleta I*"), cert. denied, 514 U.S. 1016 (1995), the United States Court of Appeals for the Fifth Circuit held that the Restoration Act, and not IGRA, governed gaming on the Pueblo's reservation. In reaching its decision, the court found a conflict in the enforcement provisions of the two statutes (albeit without examining 18 U.S.C. § 1166, the enforcement provision of IGRA). Next, it misapplied precedent of this Court in finding that the Restoration Act, and not IGRA, the specific act and thus controlling. It then dismissed the case on Eleventh Amendment grounds.

Egregious as these errors were, they paled alongside the court's dicta that section 1300g-6(a) was not enacted by Congress with an eye towards *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). In making this finding, the court ignored the only legislative history which spoke to the final amendment of section 1300g-6. *See* 133 Cong. Rec. 22,114 (1987). Instead, it based its decision on a later act involving a tribe in South Carolina! *See* 36 F.3d at 1335 n. 22. Because the court lacked jurisdiction the dicta was worse than just wrong—it constituted an unconstitutional, advisory opinion. *See* 18 C. Wright & K. Graham, Federal Practice and Procedure, § 4421, p. 207 (1981).

On September 27, 1999, the State of Texas filed an Original Complaint for Injunctive Relief to enjoin Pueblo-sponsored gaming activities on its reservation pursuant section 1300g-6. In denying the Pueblo's motion to dismiss, the district court relied on *Cabazon* and *Bryan v. Itasca*

County, 426 U.S. 373 (1976), to hold that section 1300g-6(b) ("Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas") specifically granted Texas regulatory authority over gambling on the Pueblo's reservation! *See Texas v. Ysleta del Sur Pueblo*, 220 F.Supp. 2d 668, 694 (W.D. Tex 2001).

Two years later, the district court granted Texas an injunction, *see* 220 F.Supp. 2d 668, and the Pueblo appealed. The Pueblo objected, among other things, that the injunction banned all gaming—lawful or not. The court of appeals affirmed. 237 F.3d 631 (5th Cir. 2000), cert. denied, *sub. nom. Ysleta Del Sur Pueblo v. Texas*, 532 U.S. 1066 (2001).

Subsequent to the appeal, the district court entered its Order Modifying September 27, 2011, Injunction, wherein the court agreed that its original injunction—the one affirmed by the court of appeals—was over broad. *See* Appendix C. ("[T]he legal and practical effect of the Court's injunction was to cease all gaming activities by the Defendants.") The court, however, refused to modify the injunction to permit the Pueblo to engage in carnival contests and charitable bingo in accord with the substantive provisions of state law.

The district court required the Pueblo be a "qualified organization" in order to conduct carnival contests. The Pueblo did not request to sponsor any carnivals (which would require it to be a qualified organization under State law), but to conduct contests at such a carnival on its reservation. With respect to charitable bingo, the court required the Pueblo to be a qualified organization and to obtain a license from the Texas Lottery Commission:

> To make the otherwise qualified showing, and to ensure that its charitable bingo proposal is not in violation of the Texas Penal Code, the Court concludes that the Tribe should be required to procure a license from the Commission. Only upon making this otherwise qualified showing, and proper motion to this Court, will the Court

consider modifying the injunction to permit charitable bingo activities by the Tribe.

Appendix C. More revealing than the requirement that the Pueblo obtain a license is the court's pronouncement that the Pueblo would then have to seek another modification of the court's injunction!

Although the courts below have given lip service to the congressional mandate in section 1300g-6(b), their creation of continual oversight through the admittedly, over broad injunction has imposed a federal-state regulatory scheme over *permitted* gaming activities. (Non-permitted gaming activities are banned as a matter of federal law). The genesis of this untenable and illogical scheme are the errors committed in *Ysleta I*.

While this Court has reiterated that it is not primarily concerned with correcting errors in lower court decisions, it has been noted that this Court has accepted cases for review for no other apparent reason. Robert L. Stern *et al.*, Supreme Court Practice 192-193, (7th ed. 1993). The course of litigation between the Pueblo and Texas is littered with such errors, all to the detriment of the Pueblo. It also involves an Indian tribe which faces catastrophic injury because these fundamental errors which have granted the State of Texas regulatory power over the Pueblo's reservation despite a specific Congressional prohibition. In *Williams v. Lee*, 358 U.S. 217, 218 (1959), certiorari was granted because of a "doubtful determination" by the court below "of the important question of state power over Indian affairs."

CONCLUSION

Petitioners respectfully request that this Court grant its petition for a writ of certiorari

Respectfully submitted,

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